In The
Supreme Court of the United States

No. 48
October Term, 1962

FEDERAL POWER COMMISSION, Petitioner

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY

No. 50
October Term, 1962

CITY OF PITTSBURGH, PENNSYLVANIA, Petitioner,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF PENNSYLVANIA AND THE PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF THE FEDERAL POWER COMMISSION

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INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission, an agency of the Commonwealth, file this Brief pursuant to Rule 42(4) of the rules of this Court.

The Pennsylvania Public Utility Commission respectfully represents that it is a regulatory body of the Commonwealth of Pennsylvania, having jurisdiction to regulate rates and charges for the sale and distribution of gas pursuant to the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, 1101. This statute reposes in the Commission responsibility for the regulation of public utilities and for the preservation and protection of the public interest. The Pennsylvania Commission has an interest in any proceeding which affects the supply of natural gas and the rates charged to public utilities distributing gas within the Commonwealth of Pennsylvania.

Tennessee Gas Transmission Company is a major supplier of a number of such distributing companies and of their wholesale suppliers. The issues presented by the instant case, may have a substantial impact on the cost of gas to distributing companies and on the rates charged to ultimate consumers in Pennsylvania. Moreover, the outcome of such issues may affect action by the Federal Power Commission with respect to both pending and future proceedings

involving rates of other natural gas companies supplying gas to distributing companies in Pennsylvania and their wholesale suppliers.

Because of the broad impact of any decision rendered in this case on the rates to be charged to ultimate consumers in Pennsylvania, we urge the Court to reverse the decision below (Reported at 293 F. 2d 761).

STATEMENT OF THE CASE

The Petitioners request that this Court review a decision of the Fifth Circuit Court of Appeals which sets aside an order of the Federal Power Commission requiring an immediate reduction in rates and the refunding of that part of the increased rates collected subject to refund and found by the Commission's order to be excessive.

The history of the proceedings commencing with the order of the Federal Power Commission and the subsequent review by the Circuit Court is set forth in the Brief submitted by the Federal Power Commission.

ARGUMENT

The Pennsylvania Public Utility Commission is greatly concerned that the interim rate order procedure will be rendered ineffective if the decision of the lower court in the instant case is permitted to stand. The decision of the Court of Appeals would prevent the Commission from making use of an important procedural device to curtail increases, even after proven excessive, and to require appropriate refunds. The Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission are filing their amicus brief in this proceeding to urge this Court to protect the rights of their inhabitant consumers, as well as the rights of consumers everywhere that depend upon supplies of natural gas regulated under the Natural Gas Act, June 21, 1938, 52 Stat. 821; Title 15 U.S.C. 717-717w.

A. The Importance of and Necessity for the Interim Order Procedure in Rate Proceedings

A heavy burden has been placed on natural gas consumers by the increases in rates of natural gas companies made effective, subject to refund.[1] The chair-

[1] Under Section 4(e) of the Natural Gas Act, a natural gas company may file an increase in rates and, if the Commission should suspend it, the company may, by motion, make the increase effective after the five month suspension period elapses.

man of the Commission stated in August, 1962 that $900,000,000 had been collected subject to refund in proceedings involving natural gas pipeline companies pending before the Commission. The Commission's press release, announcing the recent examiner's decision in the instant Tennessee case at Docket No. G-19983 noted that $270,000,000 had been collected subject to refund under the rates made effective in Tennessee's three pending proceedings. It is estimated that the Tennessee increases aggregate $64,000,000 a year over the last finally adjudicated Tennessee rates. Thus, the amount Tennessee collects subject to refund is growing at a rate of more than $5,000,000 per month.

The Commission is charged with the duty under the Natural Gas Act of protecting consumers from excessive rates. This Court has said:

> ". . . The (Natural Gas) Act was so framed as to afford *consumers* a complete, permanent and effective bond of protection from excessive rates and charges. . ." (Emphasis added.) (*Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388)

One form of consumer protection envisaged by Congress was that consumers should receive prompt relief from excessive increases in rates. Section 4(e) of the Natural Gas Act states in part:

> ". . . At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural gas company, and *the Commission shall give to the*

> *hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.*" (Emphasis added.)

The Commission's use of the interim rate order procedure is therefore of great import in effectuating the purposes which Congress sought to accomplish by its passage of the Act. It is incumbent upon the Commission to take whatever steps it can to alleviate "as speedily as possible" the burden imposed on consumers by rates made effective subject to refund. The interim order procedure permits early refunds and rate reductions to be made when a portion of an increased rate is found to be unjustified. The Commission developed and adopted this procedure because it knew full well that final disposition of rate increases must await lengthy administrative proceedings and possible judicial review. This Commission policy has been sanctioned by the Courts. In *Natural Gas Pipeline Company v. Federal Power Commission*, 120 F. 2d 625, affirmed, 315 U.S. 575, the Circuit Court urged the use of interim orders in rate proceedings, stating:

> "... We must and do hold that upon a proper showing, and when the hearing has reached a stage where the Commission may determine that a reduction (or an increase) of rates should be made, it may (and should) make such order, even though the hearing be not completed."

In our opinion, the above language *directs* the Commission to use the interim order procedure wherever possible. This is in accord with the Act's mandate to decide rate questions "as speedily as possible".

The Commission is well aware that the question of a proper rate of return has an important bearing upon the overall allowable cost of service in a rate proceeding. The Commission is cognizant also, that disposition of this issue is a matter of discretion to be decided on the basis of evidence available to it from industry and public sources and testimony with respect thereto without reference to other issues concerning various aspects of the cost of service. In the instant case, the Commission correctly concluded, in view of the claimed allowance of 7% compared with historical allowances in the neighborhood of 6%, that an interim finding and order on the issue of rate of return would have a significant impact upon the allowable cost of service and the rates charged to Tennessee's customers.

The order of August 9, 1960, resulted in a reduction in the jurisdictional rates charged of $11,000,000 annually. Since that order was issued, Tennessee's customers have received the benefit of refunds and reductions amounting to at least $25,000,000. Thus the burden of increased rates has been substantially reduced through the interim order procedure and such benefit will continue as a direct result of such procedure until final determination is made of Tennessee's rates in these proceedings.

It is evident from the above, that without such a device, the natural gas companies would be enabled to continue to collect excessive rates and thus consumer interests would not be fully protected as was intended by the Act. It is noted that this Court has spoken of consumer rate protection as the "primary

aim of the Natural Gas Act" (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610).

A public utility rate proceeding is almost invariably intricate and protracted and often involves various difficult issues. This necessitates extended hearings with a complex and voluminous record. Of necessity, a great deal of time is required for briefs, an examiner's decision, oral argument, the formulation of a final Commission decision and the court review which is not unusual in this type of proceeding. Unless relief is provided during this period of time, the rate payers would be burdened with the excessive rates until the final conclusion of the case.

The instant case is a good example of such a protracted proceeding. Tennessee filed for rate increases in 1957 (G-11980), 1958 (G-17166) and 1959 (G-19983). Under Section 4(e) of the Natural Gas Act, each of these increases was suspended for the statutory five month period. The increased rates subsequently went into effect and have been collected as filed, subject to refund, pending determination of their justness and reasonableness by the Commission. None have been finally decided.

Without burdening this Court with a mass of details as to the record in these proceedings, suffice it to say that after many days of hearings and conferences spanning a period of more than three years, the only action taken thus far, has been the issuance of an examiner's decision and Commission Opinion on cost allocation in the first docket;[2] and an interim

[2] The subject Opinion No. 352 was issued on February 6, 1962 almost eighteen months after the disputed interim order on rate of return was issued.

order on rate of return and an examiner's decision on cost of service issues in the third docket. Judicial review is pending on the allocation issue and exceptions have been filed on the cost of service issues. But this is by far not the end of the road. Still to be acted upon are exceptions to the examiner's recent decision. Hearings have yet to be held on rate design in Docket G-19983 and on cost of service, including rate of return, and rate design in Docket G-11980 and on all issues in Docket G-17166. We are aware that some of the procedural delay may be lessened by consolidation, but nevertheless, the issues must be dealt with.

In view of the above, it is evident that the Commission had more than sufficient reason to institute the interim order procedure without awaiting decision on any of the remaining issues.

Concurrently with the issuance of the examiner's recent decision in the third docket, he scheduled a settlement conference, currently in progress, embracing all three dockets in an attempt to bring an early conclusion to these proceedings and thus avoid the otherwise inevitable delay. As a matter of fact, a major effort has certainly been noticeable on the part of the Commission to settle pipeline rate cases without the need of the formal hearing procedure. This is another device by which the Commission is attempting to speed up the disposition of pending cases to produce *early rate reductions and refunds to consumers.* However, every case pending before the Federal Power Commission cannot be settled. Certain cases, as the instant one, because of controversy must of necessity go to hearing, and the Commission's

interim order is an instrument to provide similar benefits, i.e., *early rate reductions and refunds to consumers.* Yet the lower court seemed to ignore the above purpose of the Act when it stated that until the Commission fixes rates under Section 4(e), the consumer is protected by the refund of excess charges with seven percent interest. Obviously, a promise of future refunds does not protect consumers in the same manner as early refunds and rate reductions. We think that this was the Congressional intent when it directed speedy Commission decisions of rate questions. It certainly would be to no avail if the Commission merely apprised consumers of the fact that they were paying excessive rates and that refunds would be made some time in the indefinite future.

The refund provision is also inadequate because in addition to postponing relief from excessive rates, it deprives many consumers of the refunds to which they are entitled. Refunds by distributing companies are passed along to the consumers being served at the time the distributor receives refunds from the natural gas company. Because of shifts in population over a period of time, the consumer that paid the increase is often not there to receive this refund.

B. The Lower Court's Error

The Court below apparently recognized that the Commission had authority to issue interim orders. However, the majority was convinced that consumers would be adequately protected by Tennessee's refund obligation and that the Commission's interim order, in this instance, was unreasonable and an abuse of discretion because the Commission should have first decided the allocation issue; otherwise, the Court felt no basis existed for setting rates and Tennessee could suffer irreparable injury.

In our opinion, the Court below mistakenly subordinated the interests of consumers to the interests of Tennessee. We need not repeat here our view expressed above that Congress intended the Act primarily for the benefit of consumers. Yet, despite the Court's affirmance of the Commission's rate of return finding, it decided that consumers must wait until final decision of this case before refunds would be received.

The Court also erred in declaring that a decision on the allocation issue must precede any rate reduction and refunds. Aside from the Court's erroneous assumption that the issue was then ripe for decision, we submit that no such requirement existed. Tennessee received a full hearing on the rate of return question and failed to satisfy its burden of proof under the Act. We do not believe that the Act contemplated that the Commission must assume the bur-

den of proving that an increase unsupported by the company might be supportable by other possible evidence not yet adduced. In any event, there was reason to believe that other costs of service claimed by Tennessee were excessive. This is supported by the subsequent examiner's decision indicating that the excess was approximately $25,000,000 annually. The order requiring the interim reduction and refunds was based on Tennessee's own claimed cost of service, other than rate of return, and its own allocation principles.

It so happens that the Commission's allocation decision issued subsequent to the interim order did not depart substantially from the method advocated by Tennessee. Notwithstanding the possibility that the Commission's final orders on cost allocation and cost of service could indicate that Tennessee is entitled to receive greater revenues in one or more rate zones than those collected under the interim order rates, we submit that Tennessee does not have a vested right to the revenues within a rate zone or overall revenues which would produce a 6⅛% return. Although the Commission's order found an overall 6⅛% return to be a just and reasonable allowance for Tennessee, which finding was affirmed by the lower Court, the Commission is not obligated to insure that Tennessee earns this return. It is within the Commission's discretion to order rate decreases to the lowest reasonable rates.

Section 5(a) of the Act states:

> ". . . the Commission may order a decrease where existing rates are unjust, unduly discrim-

inatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

By long standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense.[3]

In this connection, the Court of Appeals for the Eighth Circuit stated in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, 143 F. 2d 488, 496:

> "The last question for consideration is whether the return allowed by the Commission has been shown to be unjust, unreasonable or confiscatory.
>
> "The opinion of the Supreme Court in the Hope Natural Gas Company cases indicates to us that, aside from questions relating to procedural due process and to jurisdiction, a reviewing court may interest itself only in the effect of the Commission's order. The court cannot concern itself with the Commission's choice of formulae or the propriety of the methods employed by it in reaching its conclusion, but only with the consequences of the order made. If the effect of the order is to deny to the utility a return sufficient reasonably to meet its necessities and to enable it to continue to render adequate public service, the order is arbitrary and confiscatory and may be set aside. It seems apparent that the Supreme Court is presently of the opinion that, within broad limits, the Federal Power Commission should be freed from judicial interference in regulating rates of nat-

[3] See: *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585; *Los Angeles Gas Corp. v. Railroad Commission*, 289 U.S. 287, 305.

ural gas companies. It is evidently no longer necessary for a reviewing court to consider many of the doubtful and debatable questions which ordinarily arise in every rate case.

> "The order of the Commission must be affirmed unless the petitioners have made a convincing showing that it is unreasonable in its consequences because the return allowed is insufficient to enable them to meet their expenses of operation, to pay interest on their bonds and dividends on their stock, to maintain their credit and to attract capital or is clearly out of line with the returns on investments in enterprises involving comparable risks."

If we assume, arguendo, that Tennessee fails to earn a 6⅛% return under the rates established by the interim order, no injury may be claimed unless the overall return is reduced to the level of confiscation.

On this point, the Supreme Court in *F. P. C. vs. Natural Gas Pipeline Co.*, supra, stated:

> "Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, the Commission is also free under Sec. 5(a) to decrease any rate which is not the 'lowest reasonable rate'. It follows that the congressional standard prescribed by this statute coincides with that of the constitution, and that the courts are without authority under the statute to set aside as too low any 'reasonable rate' adopted by the Commission which is consistent with constitutional requirements."

The lower Court, in the present case, invalidated the Commission's interim order on the assumption that the retroactive effect of the final determination of the cost allocation issue will make it "highly unlikely, if not impossible, for a utility to earn a 'just and reasonable return'."

The Court not only fails to lay any foundation for this assumption, but has acted without the legal criteria declared necessary by this Court in the *Natural Gas Pipeline* case, supra:

We submit that rates not shown to be confiscatory cannot be set aside, and that the reasoning of the Court below on the interim order issue is contrary to both fact and legal precedent and can not be sustained.

The Commission's issuance of an interim order in this case was an attempt to satisfy the obligations placed upon it by the Natural Gas Act to protect consumer interests. We submit that the interim order was not unreasonable or an abuse of Commission discretion, but was in full accord with the requirements of the Act, Congressional intent and judicial precedent.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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